Supreme Court, U.S.
FILED

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1994**

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GEOFFREY J. WALDAU

Petitioner.

v.

MERIT SYSTEMS PROTECTION BOARD

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

Geoffrey J. Waldau, pro-se
6 West Mount Vernon Place
Baltimore, MD 21201
(410) 244-8471 (H)
(410) 767-8104 (O)

28 pp

## QUESTIONS PRESENTED

1. Whether a U.S. Postal Service senior-level headquarters management staff employee to the Deputy Postmaster General is a "managerial employee" under Supreme Court/ National Labor Relations Board ("NLRB") law, thereby ineligible to join a union, and thereby entitled to appeal rights before the U.S. Merit Systems Protection Board ("MSPB") under the Postal Employee Appeal Rights Act ("PEARA").

2. Whether same employee who provides analytical assistance to persons exercising managerial functions in labor relations matters is a "confidential employee" under Supreme Court/ NLRB law, and thereby entitled to same appeal rights.

## LIST OF PARTIES

The following is a list of all parties to the proceding in the court whose judgement is sought to be reviewed.

Eric Flores, Attorney
U.S. Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 816
Washington, DC 20419

Janet Noble, Attorney
Law Department
U.S. Postal Service
Washington, DC 20260

## TABLE OF CONTENTS


I. Table of Cases, Statutes and Authorities.....iv
II. Introductory Prayer..... 1
III. Citations to Opinions Below..... 1
IV. Jurisdiction..... 1
V. Statutes Involved..... 1
VI. Statement of the Case..... 2
VII. Reasons for Granting Writ..... 7

VIII. Conclusion.....13

Appendix: MSPB Initial Decision (Dismiss Appeal)
U.S. Court of Appeals (Affirm without Opinion)
Statute Involved (PEARA)

## I. Table of Cases, Statutes and Authorities

Cases

NLRB v. Yeshiva University, 444 U.S. 672 (1980)
NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170, 102 S.Ct. 216, 70 L.Ed.2d 323 (1981).

Waldau v. MSPB, 19 F.3d 1359 (1994).
McCandless v. MSPB, 996 F.2d 1193 (Fed. Cir. 1993).

University of Dubuque, 289 NLRB No. 34 (1988)
FHP Inc., 274 NLRB 1141 (1985)
Case Corp., 304 NLRB No. 152 (1991)
NLRB v. Case Corp., 995 F.2d 700 (7th Cir. 1993)

Associated Day Care, 269 NLRB No. 32.
Prince Gardner, 231 NLRB No. 14
Hughes Tool, 97 NLRB 1109
Crest Mark Packing Co., 283 NLRB No. 151
West Chemical Products, 221 NLRB No. 45.
Bechtel Incorporated et al., 215 NLRB No. 126
Reymond Baking, 249 NLRB No. 156

Statutes

Postal Employee Appeal Rights Act (PEARA), 39 U.S.C. § 1005(a)

Congressional Record - House, March 3, 1987
Congressional Record - Senate, July 28, 1987

## II. INTRODUCTORY PRAYER

Petitioner, Geoffrey J. Waldau, prays that the Supreme Court grant a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit ("CAFC").

## III. CITATIONS TO OPINIONS BELOW

Judgments without opinion of the U.S. Court of Appeals for the Federal Circuit (App., *infra* at A8) are published periodically in Table form. The initial decisions of the Merit Systems Protection Board (App., *infra* at A1-A7) are not generally published in Merit Systems Protection Reports.

## IV. STATEMENT OF JURISDICTION

Decisions of the Federal Circuit may be reviewed by certiorari and by certification under the circumstances prescribed in 28 USC § 1254. Because the Federal Circuit is an Article III tribunal, any case properly falling within its juridiction is potentially subject to Supreme Court review under Article III of the Constitution. The CAFC's judgment to affirm without opinion was issued on March 13, 1995.

## V. STATUTES INVOLVED

The statute involved is the Postal Employee Appeal Rights Act ("PEARA"), 39 U.S.C. § 1005(a) and 5 U.S.C. § 2108. The PEARA (App., *infra* at A9) extends Merit Systems Protection Board ("MSPB") appeal rights to union ineligible U.S. Postal Service employees. See *McCandless v. MSPB*, 996 F.2d 1193 (Fed. Cir. 1993). The Supreme Court/ National Labor Relations Board ("NLRB") standards and tests used to determine union eligibility under the National Labor Relations Act ("NLRA") govern the MSPB and CAFC in determining MSPB appeals rights under the PEARA.

## VI. STATEMENT OF CASE

This case considers a Postal Service employee's claim that he is entitled to appeal his removal before the MSPB under the PEARA. Petitioner qualifies if he is a management employee or an employee engaged in personnel work in other than a purely non-confidential clerical capacity ("confidential employee") 39 U.S.C. § 1005(a). These jurisdictional issues are in dispute. It is undisputed that petitioner worked in his present position for more than a year and was neither a preference eligible nor a full-time supervisory employee. To establish jurisdiction, Petitioner carries the burden of proving with a preponderance of evidence that he was either a managerial or confidential employee under the PEARA.

The adjudicatory history of this case prior to 1994 is contained in *Waldau v. MSPB*, 19 F.3d 1359 (1994), ("*Waldau-I*"). In March 1994, the CAFC remanded the case to the MSPB because the MSPB had used an impermissible "final signatory authority" test. The CAFC researched extensive Supreme Court and NLRB case law on managerial employee union ineligibility and determined the MSPB's test to be impermissible in evaluating the status of a "de-facto" manager. The case was remanded for application of proper tests and an evidentiary hearing on Petitioner's confidential status.

The AJ dismissed the case for a third time on July 29, 1994, finding that petitioner was neither a management employee nor a confidential employee. See attached Initial Decision ("*Waldau-II*"). On Oct. 6, 1994, the Board denied the petitioner's "Petition for Review" using its short form without opinion. Petitioner again appealed with the CAFC, pointing out how his duties were similar to those found to be managerial and confidential in Supreme Court/NLRB case law. The CAFC affirmed the MSPB decision without opinion on March 13, 1995. This petition for writ of certiorari is timely filed.

Managerial Status

The record shows that Petitioner was a senior-level management staff employee to the Deputy Postmaster General. Petitioner, an operations performance-analyst, was assigned or self-initiated studies on policy issues, whereby he would design a study and use his discretion, judgment, analytical experience and education to develop policy recommendations. Agency witness Denny testifies that staff could initiate policy changes. Petitioner served on USPS headquarters committees and made policy recommendations in the areas of planning, national budgets and cost controls effecting employment levels and employee evaluation and compensation policy. Petitioner's recommendations to senior management and the Deputy Postmaster General were relied upon and regularly followed, but Petitioner did not have final authority over the policy decisions.

The MSPB's legal reasoning in *Waldau-II* is unclear. However, on brief to the CAFC, the MSPB argues that petitioner's recommendations are "technical advice" and not policy recommendations, hence not managerial. The MSPB brief cites *Case Corp.* where a group of industrial engineers make recommendations concerning layoffs, cost reductions, and staffing levels to the department manager but do not have final decision authority. The NLRB finds that these employees provide technical advice, but do not have final authority, hence are not managerial, hence union eligible. *Case Corp.*, 304 NLRB No. 152 (1991)

To support his managerial status, The petitioner cites *Yeshiva University*, where college faculty are found to be managerial. *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) The definition of managerial employee is those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Management employees "must exercise discretion within, or independently of, established employer policy and must be aligned with management." Also they take or recommend "discretionary actions that effectively control or implement employer policy." *Id.*

Petitioner also cites *FHP Inc.* and *Dubuque University*, in which the NLRB cites *Yeshiva* and uses a "recommendations regularly followed" test instead of a "final authority" test. The *Dubuque* faculty who sit on the Institutional Development Committee recommend budgets that affect employment and other policies to university administrators. Because their recommendations are regularly followed, the NLRB finds these employees to be managerial, hence union ineligible. *University of Dubuque*, 289 NLRB No. 34 (1988). The physician committees in *FHP, Inc.* develop formulary for cost related concerns and make recommendations concerning core operations and employee compensation to department heads that are regularly followed. Even though these employees lack final authority, the NLRB finds them to be managerial, hence union ineligible. *FHP Inc.*, 274 NLRB 1141 (1985)

There is a conflict in the NLRB decisions among lower courts and an apparent conflict with applicable decisions of the Supreme Court. In *Yeshiva*, the Supreme Court indicates that final decision authority or ultimate authority is not a proper standard in determining managerial status, because "the relevant consideration is effective recommendation or control rather than final authority." *Yeshiva*, 444 U.S. at 683, n.17, 100 S.Ct. at 863, n.17. In *Waldau-I*, the CAFC cites *Yeshiva*, *Dubuque* and *FHP* and disallows the MSPB's "final signatory authority" test in determining "de-facto" managerial status. The recent NLRB *Case Corp.* opinion relies on a final authority test which appears to be in conflict with *Yeshiva*. On brief, the MSPB cites *Case Corp.* and the CAFC affirms without opinion, apparently reversing its prior recognition of "de-facto" managers in *Waldau-I*. The CAFC's affirmance of *Waldau-II* also appears to be in conflict with *Yeshiva*.

Confidential Status

The record shows that Petitioner conducted analytical studies to assist management in the field of labor relations between the USPS and both the National Rural Letter Carrier

Association and the National Association of Letter Carriers. Petitioner participated in strategy meetings, helped develop proposals and arguments to support management's position concerning union salaries. He met with management and union officials to explain his studies and had access to confidential information that was inextricably intertwined with his duties to provide analytical assistance to the Deputy Postmaster General and management negotiations teams.

The MSPB's *Waldau-II* decision contends that "even if" Petitioner was a confidential employee in 1985, he was no longer in a confidential position in 1990. App., *infra* at A5. On brief to the CAFC, the MSPB argues that petitioner did not spend a significant amount of time on labor relations matters to make his duties "regular". The MSPB brief also argues that Petitioner's labor relations work is not really confidential because study results and management's position are eventually presented to the union.

On brief to the CAFC, the MSPB cites *Case Corp.* in which industrial engineers are found to be union eligible. The NLRB finds that the industrial engineers are involved in local contract negotiations, analyze union costs and critique union proposals but may not know the precise terms the employer would accept. In a dissenting opinion, NLRB member Oviatt states he would exclude the industrial engineers from the bargaining unit as "confidential employees" because they "must use discretion and judgment in determining whether additional employees are required" and are "involved in strategy meetings to respond to proposals by the Union" hence are "specially aligned with the employers interests in the area of labor relations." *Id.*

The Petitioner cites *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170 (1981) in which the Supreme Court affirms the NLRB's long-established "labor-nexus" test. Under this test, those employees who act in a confidential capacity to persons exercising managerial functions in labor relations matters are confidential employees. 454 U.S. at 188-189. In addition, the Court approves the NLRB's alternative test

that employees who have "regular" access to confidential information concerning anticipated changes that may result from collective-bargaining negotiations are also confidential employees.

The record shows that Petitioner was available to assist in labor relations and his duties were repeatable in the future, hence "regular" under Supreme Court/ NLRB case law. Regardless of frequent reorganizations within the Deputy Postmaster General's staff, the Petitioner passes an "availability and repeatability" test from 1985 to the time of his removal in 1990. Agency testimony and documents prove that Petitioner assisted in labor relations matters and had access to confidential information periodically from 1985-1990. The testimony of agency witnesses Denny, Dobbins and West prove that Petitioner updated a confidential study in 1990 to help management prepare for the 1990 contract negotiations, and that he was available to participate in strategy meetings in 1990 if needed. The 1989 reorganization within the Deputy Postmaster General's staff did not change the Petitioner's analyst duties.

The record shows that Petitioner's duties were confidential because he participated in the labor relations strategy meetings and had access to confidential information that was unkown to the unions and could have been used by the union to advance union interests contrary to management interests. The Petitioner assisted management in developing arguments to support the USPS's labor relations position, had advance knowledge of the salary "incentive bumps" that would be offered to the union, was privy to study methodology choices that were favorable to the USPS, and was privy to study results that would strengthen the union's bargaining position.

Testimony of agency witness Kreiner, a management negotiator, provides specific examples of confidential information that Petitioner had access to that would compromise the Postal Service's position in labor relations. Kreiner testifies, "There was a meeting where we talked about the things we could do [study methodologies]. We painted two of them as so bleak and one as so rosey... we co-opted the rurals [union] into

agreeing that [the regression method] was the best way to go... I probably hoped they would never figure it out [the method chosen would never support a salary increase]." Once the union agreed to a study methodology favorable to the USPS, it would be too late to go back to the arbitrator and request a new study methodology just because the first study did not support a salary increase. Petitioner also had access to confidential productivity studies that could be used by the rural carrier union to support arguments to increase their compensation relative to city carrier union compensation. Kreiner testifies, "when we negotiated, we rarely told them [the rural union] how great they were".

Petitioner could have divulged this confidential information to assist the rural carrier union obtain higher salaries. Petitioner could have warned the union not to agree to the "rosey" study methodology and request one of the two "bleak" methodologies from the arbitrator. Petitioner could have divulged his confidential productivity comparisons and management's statements indicating the union had the strong bargaining position for a higher "incentive bump" because management feared losing the NRLCA's highly productive and seldomly grieved evaluated compensation system and Fair Labor Standards Act exemption. These breaches of confidentiality would have compromised the USPS's bargaining position.

## VII. REASONS FOR GRANTING WRIT

The Supreme Court should grant a writ for several reasons: (1) The CAFC judgment is final in absence of Supreme Court Review, (2) union eligibility is a significant and important issue of federal law, (3) recent NLRB and MSPB decisions are in clear and direct conflict with Supreme Court decisions on union eligibility, (4) the issue of union eligibility is troublesome because there are and will be other USPS management staff employee cases with similar facts pending at the MSPB making desirable an early and definitive ruling by the Supreme Court, and (5) as there are many similar management staff positions at the USPS and in corporate America, a definitive ruling should

provide guidance to the NLRB on how these cases should be decided.

Managerial employee

This is an important test case because the USPS as well as many American businesses have numerous employees who are in similar management staff positions. The facts in the instant case are similar to those found in *Case Corp.*, *Dubuque* and *FHP Inc.* The disputed employees all develop recommendations directed at "core" management policies for their respective organizations that are regularly followed, either as a full-time or part-time duty. However, without a consistently applied standard, some are found to be "managerial" and some are not.

Union eligibility will be a recurring issue. There is a large population of non-supervisory management staff employees like Petitioner under various titles such as operations research analyst, management analyst, financial analyst, industrial engineer, program manager and operations specialist who develop core policy recommendations in areas such as planning, department modifications, budgets that effect employment, staffing levels, program startup and discontinuance, cost control, operating policy improvements, employee evaluation and compensation.

Regardless of lack of final authority, the unionization of these employees would cause a bias in policy recommendations to favor the union and disfavor the employer. This would create a lack of trust between management and their staff, and cause a decline in productivity. Participation in a labor organization would create a conflict of interest with their job responsibilities.

Although the MSPB's reasoning in *Waldau-II* is unclear, it is certainly incorrect. Because the MSPB decision finds a senior-level headquarters management staff employee to be non-managerial, the Supreme Court's standard for "managerial employee" appears to have been misapprehended and grossly misapplied. Supreme Court guidance is needed to clear up the legal controversy and set forth the proper tests for "managerial

employee" and related concepts (e.g., core management policies, technical advice, assigned and regular duties, discretion, effective recommendations, final authority, alignment with management or lack thereof). Supreme Court power of supervision should again be exercised on the issue of management employee union ineligibility.

Confidential employee

On the confidential issue, the MSPB's decision is also incorrect. The MSPB's "amount of time" test for confidential employee is in conflict with numerous NLRB cases that rule this test to be impermissible. See App. *infra.* at A5; *Prince Gardner; West Chemical Products; Bechtel Incorporated; Reymond Baking; Associated Day Care.* This test is therefore in conflict with the Supreme Court definition of "confidential employee" in *Hendricks County.* Union negotiations are periodic by nature. Confidential information can be relayed and absorbed within minutes. It would take only one instance of breach of confidence or divulgence of management's strategy to the union to cause harm to the employer. By specifying an arbitrary "amount of time" test, a lower court can effectively subvert the Supreme Court's definition. Petitioner argues that the MSPB does so in the instant case.

In *Case Corp.*, NLRB member Oviatt is correct in his dissent because a lack of trust would develop between analyst and employer. There would be a close and inextricable relationship between development of negotiations strategy and supporting analysis. Distrust would occur because an employee who conducts studies to support labor relations would be privy to the choice of study methodology that might impact results, privy to results favorable to either management or union, and privy to how best to formulate a counter bargaining strategy and position. When labor relations strategies are discussed, management needs to reveal how the supporting analysis may be used to further management interests contrary to union interests. If analysts are unionized, management negotiators would have

to pray that the union members conducting the analysis to assist management would not divulge management's strategy, the weaknesses in management's position and how to use the confidential information to counter management's interests. An employer should not be required to implement its labor relations policies through a unionized staff sympathetic to union interests.

The nub of the controversy is the proper standard for "confidential professional employee." The Supreme Court should clarify the proper tests i.e., whether an employee's participation in strategy meetings to develop management's position in labor relations is per-se "confidential", or whether access to specific confidential information must be demonstrated to be confidential and whether an "amount of time" or "availability and repeatability" test is appropriate. These questions and the facts in the instant case will recur frequently and support Oviatt's reason for dissent. Again, Supreme Court guidance is needed.

Importance of Union Eligibility Issue

This is also an important public interest case. The union eligibility issue is significant to the administration of the PEARA statute. The "appeal rights" question is likely to recur frequently and be important to the public interest for the following reasons.

The United States Congress was alarmed at the high rate of firings at the Postal Service and the negative impact that this could have on agency's ability to attract and retain good employees. Congress reasoned it would be sound public policy to have an external review of adverse actions. In 1987, the Congress enacted the Postal Employee Appeal Rights Act ("PEARA").

Postal employee appeal rights before the MSPB affects the public interest. For example, in 1986, Postmaster General Paul Carlin was fired from the Postal Service for trying to stop criminal self dealing (concerning a contract for inferior equipment) by Peter Voss of the Board of Governors. Although Voss was later imprisioned, Carlin had no judicial or statutory remedy

because his dismissal occurred prior to enactment of the PEARA. In 1990, petitioner was fired for speaking out in support of competition and privatization. The protection of meritorious employees is a public-interest issue that effects the quality of postal services to the American people.

Higher-level managers may be the targets of "whistle-blower" communications made by lower-level managers. It is sound public policy for the later to be protected from retaliatory adverse actions. The possibility of external review and the standards and tests used by the MSPB in determining its jurisdiction under the PEARA determines the extent to which the public interest is enhanced. Employees with MSPB appeal rights are more likely to take the career and personal financial risks necessary to speak out in the public interest. These communications could benefit the Postal Service, the postal industry and the American people.

MSPB appeal rights helps the Postal Service attract and retain meritorious employees who will speak out against waste, fraud, abuse and mismanagement and for beneficial changes. External MSPB review lessens the incidence of retaliatory adverse actions by reversing those actions and thereby protecting employees from abuse. Lack of MSPB appeal rights discourages meritorious employees from wanting to work at the Postal Service or speaking out in the public interest for fear of retaliation.

The Congress's public interest purpose of the PEARA could affect the Supreme Court's review of this case. CAFC Judge Clevenger made the following statement to the MSPB during oral argument in *Waldau-I*.

> JUDGE CLEVENGER: Mr. Waldau began the argument by reminded us, I think quite properly, of some of the important public policy considerations that underlie the making available of your institution [the MSPB] to certain postal workers, namely that the Postal Service would benefit from having review rights at MSPB that [the USPS] would be able to attract persons that might

> otherwise not want to work there under [other] circumstances. I think those policy considerations are probably undeniable. Where you have a case that is, lets say, at the edge -- on the cutting edge -- which this case may be, Mr. Waldau is very close to being a management employee under any of the standards applied. Why shouldn't the legal determination of what constitutes managerial employee be driven by some of these policy considerations? That is to say where the case is really close, why shouldn't the employee be deemed to be a managerial employee so as to afford to him or her the advantages of appeal before the Board? Why isn't that a very sensible way to construe a set of statutes? Oral Argument, Case No. 93-3152, *Waldau, Id.*

House and Senate floor debate of the legislation is consistent with Judge Clevenger's interpretation of the PEARA's public policy purpose. The purpose of the PEARA was to remove the unfairness and injustice of the Postal Service's internal adverse action process by extending MSPB appeal rights to more postal employees. The Congress debated the difficulty of using NLRB standards, the possibility of extending MSPB appeals rights to all Postal employees and the impact on existing union contracts of opening appeal rights to all non-bargaining employees. The Congressional Record lists the employee types that would either not be covered or fall in the grey area of NLRB law, (i.e., 10,000 Postal Service employees consisting of postal inspectors, clerical employees, payroll employees, engineers within the Postal Service Research and Development Department and attorneys located at headquarters). The Congressional Record contains no discussion of headquarters senior management staff as falling in the grey area of NLRB law. It appears that Congress contemplates that employees like petitioner would be covered under the PEARA.

Unfortunately, the CAFC *Waldau-I* decision and the affirmed MSPB *Waldau-II* decision leaves USPS management staff employees throughout the Postal Service wondering

whether they are covered under the statutory remedy provided by the PEARA. A definitive Supreme Court ruling will answer the question and conserve scarce legal and judicial resources in the future.

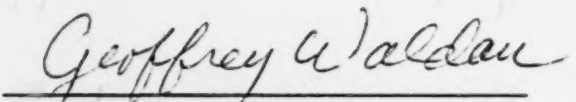
In sum, this test case is important both to the administration of the PEARA and the NLRA. There are thousands of non-supervisory management staff employees like Petitioner at the Postal Service and throughout corporate America. There are many more "full-time" professional management staff employees like Petitioner than the professionals (i.e., physicians, dentists, faculty) with routine duties (i.e., caring for patients, teaching courses) who also serve on various committees.

The standards used by the NLRB to determine union eligibility under the NLRA will impact management-labor relations and the productivity of American business. The same standards used by the MSPB will impact the Postal Service's ability to attract and retain quality employees. Allowing *Case Corp.* and *Waldau-II* to stand would open the top levels of corporate management staff to union organization, and thereby disrupt management-labor relations and preclude those meritorious USPS management staff employees most needing of protection from MSPB appeal rights.

## VIII. Conclusion

Petitioner respectfully requests that the Supreme Court grant this writ for certiorari.

Respectfully,



GEOFFREY J. WALDAU, pro-se
6 West Mount Vernon Place
Baltimore, MD 21201